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Notes, Comments, Digests

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NOTES

AIRPORT—NUISANCE—TRESPASS—MAXIM—RIGHTS OF NEIGHBORING LANDOWNERS.—[C. C. A. 6th] The United States Circuit of Appeals (6th circuit) recently modified the decree of the District Court in the case of *Swetland* v. *Curtiss Airports Corp.*[1] to include the entire operation of defendant's airport within the scope of the injunction. This is the first decision in the country banning the "normal" operations of an airport as a nuisance. The broad injunction against the operation of the airport is based upon the finding that the evidence in the case showed that the defendant's airport and flying school, although lawful in themselves, constituted a nuisance to the plaintiffs who resided in a country estate adjoining the airport. The court stated that it refused to hold that every flight of an airplane was a trespass to the landowner over whose property the flight was made, and that the present flying over the plaintiffs' property had not been within the "zone" where the plaintiffs had a right of action other than to abate a nuisance. The court considered the noise, dust, night flying, traffic congestion, the danger from low-flying aircraft, especially student flying, the impairment to the value of plaintiffs' property, the availability of other sites for defendants' airport and the financial loss to the defendant from closing the airport. The court concluded from the evidence that the normal operations of the "A1A" airport which the defendants were developing would "unavoidably interfere with, if not destroy, the plaintiffs' enjoyment of their property." Judge Hickenlooper, in a concurring opinion, dissented from that portion of the court's opinion, written by Judge Moorman, which set forth the rights of the landowner against flights in the lower stratum.[2]

Aviation affects the rights of landowners in three essentially different respects: (1) Nuisance from an airport directly. (2) Trespass-nuisance from flying over private property, in taking off and landing incident to the operation of an airport. (3) Trespass-nuisance from cross-country flying over private property, independent of airport operations, for example, repeated flying on an established airway over the landowner's property. The court in the instant case was presented with only the first two problems by the plaintiffs' prayer for an injunction against the operation of the airport. The first problem was merely the application of established rules of nuisance to a new industry and will be dealt with first in a summary manner, after the facts of the instant case have been set forth. The second raises problems peculiar to aviation and the court's treatment will subsequently be discussed and suggestions made. The third problem was not involved in the instant litigation and will not be treated in this note.

The Swetlands owned a hundred and thirty-five acre tract of land on

1. 47 F. (2d) 929 (N. D., Ohio, 1930).
2. *Swetland* et al. v. *Curtiss Airports Corporation* et al., 55 F. (2d) 201 (C. C. A. 6th Decided December 30, 1931).

the west side of Richmond Road in the village of Richmond Heights, eleven miles by direct line from the city of Cleveland. Improvements to the property approximated $115,000 and consisted chiefly of two residences, in one plaintiffs had resided for over twenty-five years. On May 28, 1929, or shortly before, the defendant corporations purchased 272 acres on the east side of Richmond Road immediately opposite the plaintiffs' residences for $398,048 for the purpose of establishing an extensive airport and flying school to serve the eastern side of the Cleveland metropolitan area. The defendants acquired a second tract in the vicinity at about the same time and were offered a third site. Both of these tracts were apparently well suited for an airport but would involve greater expense to improve than the one opposite the plaintiffs' property. The plaintiffs informed the air companies immediately that the proposed airport would "destroy" their property for residential purposes. On being advised that the defendants intended to proceed with the establishment of an airport, the present suit in equity was filed on June 1, 1929, three days after defendants purchased, to enjoin the use of defendants' property as an airport. The defendants contemplated an extensive flying school, public lights for night operations, and public exhibitions with extensive accommodation for crowds and automobiles. The "all way" landing field and hangars were to be located on the portion of defendants' property adjacent to the plaintiffs'. The nearest point of the landing field would be within 800 feet of the plaintiffs' residences, and the hangars and fairways from 900 to 1500 feet. The remote section of the tract is wooded and the defendants intended to develop that portion into a golf course and subdivision.[3] The testimony was conflicting as to the extent and height of defendants' flying above plaintiffs' property.[4] The district court enjoined (1) permitting dust to drift over plaintiff's property in substantial and annoying quantities, (2) dropping of circulars over plaintiffs' land, and (3) permitting airplanes under their control to fly over plaintiffs' property at an altitude of less than 500 feet. The plaintiffs appealed from the lower court's refusal to enjoin (1) the use of defendants' property as an airport and flying school, and (2) from the refusal to enjoin flying over their property above 500 feet. The defendants appealed only from the injunction against flying over plaintiffs' property below 500 feet in altitude.[5]

In dealing with the problem of a nuisance from an airport directly, the Circuit Court of Appeals enunciated the general formula that:

3. "W. R. Crawford, Jr., Vice President of Curtiss Airports, testified that: 'The easterly portion of the premises where there are now trees, the trees will be removed back almost to the road, which will be developed as a private residential and country club site, where there is now a small creek, and the natural beauty of the eastern part of the premises will not be affected, but it will be developed in conjunction with the rest of the airport for providing a residential and private flying club site.' There was some talk at the very commencement of the enterprise of developing the eastern part as a country club and golf club, and property owners in the vicinity wrote a letter to Curtiss Flying Service, Inc., 'expressing our belief that we consider the development of your property into a high-class airport and country club will enhance the value of our respective properties . . . .'"—Excerpt from letter to the writer from Charles P. Hine of the firm of Thompson, Hine and Flory, attorneys for the plaintiffs. See also page 29 of appellants' brief.

4. See infra, and appellant's brief, page 23.

5. The plaintiffs contended that "the flying of aeroplanes at any distance above their property is a trespass which in the nature of the operation of the air field must constantly recur, and which a court of equity should accordingly enjoin." The defendant asserted that the "plaintiffs do not own the air space above their property and have no right to prevent its use at will for flying purposes short of the creation of a nuisance."

"The defendants have the right to establish airports, but they cannot lawfully establish one at a place where its normal operation will deprive plaintiffs of the use and enjoyment of their property."

The court found that the facts of the instant case fell within this formula, and indicated that numerous factors had been taken into consideration in holding the defendants' airport a nuisance: (1) The lights and noises incident to night operations would be particularly annoying to the plaintiffs. (2) The plaintiffs' property had already depreciated $65,000. (3) The plaintiffs were old residents of the community, desirous of continuing to live there, and would be "put to the inconvenience of leaving their property and seeking other places to live." The resulting "severance of their social relations" would cause injury "that cannot be measured in damages," thereby making the remedy at law inadequate. (4) By promptly notifying the defendants that the contemplated airport would be a nuisance, the plaintiffs were guilty of no laches. (5) The value of defendants' property was not so out of proportion to that of the plaintiff's as to make abatement inequitable. Plaintiffs' property was valued at $165,000 as compared with defendants' investment of not over $398,048, and probably only $270,000, at the time of plaintiffs' notice. When the plaintiffs gave notice that the airport would be objectionable, the defendants' expenditure consisted solely of the price paid for the land which presumably was "now worth what defendants paid for it." (6) The defendants' Richmond Road "site was not indispensable to the public interest" as an airport because defendants had and could have acquired other sites equally accessible to Cleveland. (7) Low flying over plaintiffs' property would take place in taking off or landing "up-wind" when the wind was from the east or west (not the prevailing wind). The court notes that the flying of students, who, during their period of instruction of about 20 hours, average "20 take-offs and landings per hour," would be especially offensive. Property rights are involved in this last type of annoyance and will be considered below.

The court enjoined the airport only "as now located" and referred the case to the lower court, because of lack of evidence in the record, to determine whether "other parts of the property could be used without seriously interfering with the plaintiffs' enjoyment." This reference apparently refers to relocating the airport proper on the portion of the tract, above referred to, which the defendant intended to utilize as a golf course or a subdivision.

The decision of the District Court indicates that Judge Hahn either did not believe that the above elements existed in the instant case to the same degree or else did not give the same credence to them.[6] While the instant court took into consideration many factors in deciding that the defendants' airport was a nuisance, it is to be noted that there was no evidence that defendants' operations were peculiar or more annoying than would be found from the operation of any large metropolitan airport. The Circuit Court of Appeals does not use the term "nuisance per se," and its holding clearly indicates that it would not hold every airport a nuisance but that such a holding would depend entirely upon the facts of the particular case. Nevertheless the fact that defendants' airport is not peculiarly dis-

6. Their opposing views clearly indicate how such cases depend entirely upon the facts found by the judge: See *Frank*, "What Courts Do In Fact," 26 Ill. L. Rev. 645 and 761 (1932).

tinguishable from other large airports may involve important consequences in regard to the future development of airports.

In dealing with the trespass-nuisance problem from flying over private property in taking off and landing incident to the operation of an airport, the court first considers the maxim *cujus est solum ejus est usque ad coelum.* The court made the inevitable observation that the maxim had only been "used in connection with occurrences common to the era, such as overhanging branches or eaves."[7] With this premise, the court concluded that the maxim could not be used "to define the rights of the new and rapidly growing business of aviation," consistently "with the traditional policy of the courts to adapt the law to the economic and social needs of the times."

Having thus bluntly declared itself free from all precedent the court proceeded to determine the plaintiffs' rights "in relation to the necessities of the period." This daring approach would seem a desirable method of handling a problem which involves new and far reaching economic considerations. The compromise suggested by the court was premised upon the assertion that: "From that point of view we cannot hold that in every case it is a trespass against the owner of the soil to fly an aeroplane through the airspace overlying the surface." This was a direct denial of the literal interpretation of the maxim.[8] An understanding of the nature of the rights that the court asserted were possessed by the landowner can best be grasped from Judge Moorman's exact words. Having explained that certain flights did not constitute a trespass, the court went on to explain:

"This does not mean that the owner of the surface has no rights at all in the airspace above his land. He has a dominant right of occupancy for purposes incident to his use and and enjoyment of the surface, and there may be such a continuous and permanent use of the lower stratum which he may reasonably expect to use or occupy himself as to impose a servitude upon his use and enjoyment of the surface. See *Portsmouth Co.* v. *United States,* 260 U. S. 327. As to the upper stratum which he may not reasonably expect to occupy, he has no right, it seems to us, except to prevent the use of it by others to the extent of an unreasonable interference with his complete enjoyment of the surface. His remedy for this latter use, we think, is an action for nuisance and not trespass. We cannot fix a definite and unvarying height below which the surface owner may reasonably expect to occupy the air space for himself. That height is to be determined upon the particular facts of each case. It is sufficient for this case that the

7. The court recognized that the maxim had been frequently repeated "in the law reports of every state" and was imbedded in our law before the advent of aviation to the full extent that the nature of the maxim permitted. The early English cases applying the maxim were denied to have been "decided upon the theory of nuisance and not trespass." The ambiguity of the term "ad coelum" was recognized—the term referred in the Latin to the space a little above the tree tops. See *Bouvé,* "Private Ownership of Airspace," 1 Air L. Rev. 232 and 376 (1930).

8. The validity of the old maxim *Cujus est solum ejus est usque ad coelum* was apparently recently asserted in a statement by Lord Dunedin, member of the Judicial Committee of the Privy Council. A controversy had arisen over the right to project advertisements on the sky over other landowners' property by means of a search-light recently invented by Maj. J. C. Savage. Lord Dunedin expressed the opinion that the airplane owner did not have the right to fly over private property until the Air Navigation Act of 1920, Sec. 9, specifically gave that right by providing: "No action shall lie in respect of trespass or in respect of nuisance by reason of the flight of aircraft over any property." As a result, "Until it is similarly legalized, sky writing apparently remains a form of aerial trespass in England and a property owner has as good a right to protection on his sky as against a trespasser on his ground:" New York Times, Feb. 28, 1932.

flying of the defendants over the plaintiffs' property was not within the zone of such expected use."

The above language forms the crux of the court's assertion of the landowner's property rights in the airspace, and a careful examination of this particular language may prove profitable. By asserting that the landowner has a *dominant* right the court implied that there are other rights in the airspace and that such other rights are inferior to his rights. The landowner has the right of *occupancy*. In one sense, every three-dimensional object *occupies* conceptual space, whether the occupancy is temporary or permanent. Thus an airplane occupies airspace regardless of its altitude, just as much as a building on the land. The court did not use the word *permanent* to limit the landowner's occupancy, and would thus appear not to have drawn a distinction between "permanent occupancy" and "temporary invasion incident to aerial navigation," as has frequently been done.[9] The court would seem to have recognized that airplanes occupy space by restricting the landowner's occupancy to purposes which are "incident to his use and enjoyment of the surface." By the above limitation, the landowner's superior rights do not extend to aerial navigation in the airspace above his property *unless* incident to his use and enjoyment of the surface.

However, some flying may be incident to the use and enjoyment of the surface. Thus taking off and landing from an airport is clearly incident to the use of the surface. Flying instruction for students is likewise incident to the airport from which the flying is conducted. More doubtful uses may be enumerated: Anchorage of a dirigible by means of a cable without the use of a fixed mooring mast, the use of a fixed balloon or blimp for sight-seeing or advertising purposes by means of a cable for raising and lowering, smaller balloons employed in a like manner to secure meteorological information at great heights, the use of the airspace for the landowner's own homing pigeons, and for attracting wild birds for hunting. The above examples all involve *moveable* objects. In some of the instances the same objects continuously and permanently occupy *some* portion of the landowner's space but not always the identical space as do buildings; in the other instances the objects come and go but while in the airspace are more or less incident to the use of the surface. The distinction between *use* and *enjoyment* is obscure, but it would seem that essentially use refers to the physical and enjoyment to the psychological, i. e., the subjective state of mind with which the physical may be utilized. The above examples all refer to instances more or less directly associated with the *use* of the surface. How much airspace is incident to the *enjoyment* of the surface can only be found by applying the ordinary rules of nuisance to annoyances created by the use of the airspace by persons other than the subjacent owner. Of course the altitude at which each annoyance will come within the ban of nuisance depends both upon the nature of the annoyance and the use to which the surface and the space incident thereto are put.

The court proceeds to state: "And there may be such a continuous and permanent use of the lower stratum which he may reasonably expect to use or occupy himself as to impose a servitude upon his use and enjoyment of the surface." By this sentence it is believed the court intended to

9. *Zollmann*, Law of the Air (1927), p. 15; comment, 32 Harv. L. Rev. 569 (1919).

indicate a qualification upon the landowner's rights and the manner by which inferior rights might encroach upon the landowner's superior rights. The word *but* and not *and* would seem to be the correct manner of introducing this qualification. The *servitude* mentioned apparently refers to one acquired by an outsider to the detriment of the landowner's "use and enjoyment of the surface." The pronouns should then be read: "But there may be such a continuous and (or?) permanent use of the lower stratum by some person other than the landowner which stratum he (the landowner) may reasonably expect to use or occupy himself (the landowner) as to impose a servitude upon his (the landowner's) use and enjoyment of the surface."

The "continuous and permanent use" of the lower stratum appears to refer to the use of that space by an aviator or some person other than the landowner. *Continuous and permanent* would appear to refer only to *fixed* or *stationary* uses of long duration,[10] and at the present time repeated flights of airplanes or airships do not and cannot approach that character. However the context as a whole indicates that the court intended to include flying in this category. Such use must be in the *lower stratum* which is seemingly defined as that stratum which the *landowner* "may reasonably expect to use or occupy himself." This stratum is not limited by the present *actual* user of the surface, but extends to the *reasonable potential* user. Modern science has taught, if nothing else, that men cannot predict what use the next generation will make of the physical elements or airspace. The court apparently recognized this by using the word *reasonable* which orients the prediction of future users to that which men today conceive to be within the realm of possibility. In the clause describing the lower stratum the judge uses "use or occupy." The servitude is described as upon the "use and enjoyment of the surface." The upper stratum is qualified as that "which he may not reasonably expect to occupy." The clauses qualifying the phrases upper and lower stratum do so in terms of the landowner's future occupancy and/or enjoyment, but neither expressly limits such occupancy to that which is incident to the surface. Possibly such limitation must be implied but this is not certain.

The division of space into the upper and lower stratum is not an "unvarying height," but depends upon "the particular facts of each case." By distinguishing between the rights of the landowner in the upper and lower strata of airspace, the court apparently adopted a "zone theory" of the extent of the private ownership in airspace akin to that advanced by the District Court by the phrase "effective possession."[11] The Circuit Court of Appeals asserted that "the flying of the defendants over the plaintiffs' property was not within the zone of such expected use." It is difficult to determine what the court considered the upper limit of the lower stratum in the instant case. The court did not commit itself and it was not necessary for the decision with the above conclusion. However, it

10. The court uses the word "and" to connect continuous and permanent. The above comment is based upon the assumption that the court advisedly used the word "and" in the sense of "plus." However it is believed that "or" would be more correct. The use of "or" would be correct if the court intended that servitudes might be acquired by continuous or repeated passages of an airplane.

11. *Ball*, "Vertical Extent of Ownership in Land," 76 U. Pa. L. Rev. 631 (1928).

would seem that the court considered the lower stratum to be limited to an area relatively close to the surface in view of the following statement:

"Takeoffs and landings are required to be made 'up-wind,' and while the prevailing wind is neither east nor west, when there is a wind from either of these directions there will necessarily be much flying over plaintiff's property, and often it will be at a much lower altitude than 500 feet. The plaintiffs will undoubtedly suffer much annoyance from the noises made by this low flying and the warming up, taking off and landing of aeroplanes on the field."

The court limits the landowner's right of action in the upper stratum to an action of nuisance, but does not expressly mention what actions if any will lie in the lower stratum—trespass or nuisance. The landowner apparently must take legal steps to prevent the acquisition of a servitude in the lower stratum even though it does not impair his present use and enjoyment of the surface. Where a servitude may be acquired, the owner of the servient estate usually has the right to bring trespass against each act that makes up the servitude. Here the right to prevent servitudes would appear to be a burden upon the landowner rather than a benefit unless coupled with the right to bring trespass against any invasion of the lower stratum.

The desirability of choosing the term "servitude" to indicate the limitation upon the airspace rights of the landowner lies in the fact that it leaves future courts the maximum freedom to interpret the term as the facts subsequently presented demand. The term is of civil law origin and roughly corresponds to the common law term "easement."[12] Servitude is probably the broader term in that it includes profits à prendre.[13] It has been doubted whether easements can be acquired by airplanes because of the impossibility of repeating flights through exactly the same airspace.[14] Servitudes acquired by aerial navigation would apparently be "in gross" except where incident to the operation of an airport. Thus the airport would be a "dominant estate" when the servitude was acquired by flights made by an airport operator incident to taking-off and landing therefrom. The distinction between "in gross" and "appurtenant" is important for the reasons that an easement in gross is usually regarded as a purely personal right which cannot be transferred by the original holder.[15] On the other hand, an easement appurtenant, a profit à prendre in gross, and a profit à prendre ap-

12. *Blain* v. *Stabb*, 10 N. M. 743, 65 Pac. 177 (1901); *Corning* v. *Gould*, 16 Wend. (N. Y.) 531, 538 (1837); *Kieffer* v. *Imhoff*, 26 Pa. (2 Casey) 438 (1856); *Washburn*, Real Property (6th ed., 1902), Sec. 1225; *Washburn*, Easements and Servitudes (4th ed., 1885), Sec. 1, par. 4.

13. *German Savings & Loan Society* v. *Gordon*, 54 Ore. 147, 102 Pac. 736 (1909); *Kieffer* v. *Imhoff*, supra; *Ballentine*, Law Dictionary, p. 189. On servitudes in gross, see *Smith* v. *Cooley*, 65 Cal. 46, 2 Pac. 880 (1884).

14. See *Smith* v. *New England Aircraft Co.*, infra, at page 531, N. E. page 393; "Although there appear to have been a considerable number of trespasses by aircraft, it seems plain that they are not in the same place as to linear space or altitude. In the nature of things the flights of aircraft must vary with wind and load. No prescriptive right to any particular way of passage could be acquired in these conditions."

15. *Louisville, etc. R. Co.* v. *Koelle*, 104 Ill. 455 (1882); *Messenger* v. *Ritz*, 345 Ill. 433, 178 N. E. 38 (1931); *Tinicum Fishing Co.* v. *Carter*, 61 Pa. 21 (1869); *Kershaw* v. *Burns*, 91 S. C. 129, 74 S. E. 378 (1911); *Salem Capital Flour Mills* v. *Stayton Water Ditch & Canal Co.* 33 Fed. 146, 154 (C. C., Ore. 1887); *Wagner* v. *Hanna*, 38 Cal. 111 (1869). Contra: *Goodrich* v. *Burbank*, 12 Allen (Mass.) 459 (1866); *Penkum* v. *Eau Claire*, 81 Wis. 301, 51 N. W. 550 (1892); *Percival* v. *Williams*, 82 Vt. 531, 74 Atl. 321 (1909). See 2 *Tiffany*, Real Property (2nd ed.), Sec. 350, p. 1226; *Washburn*, Easements and Servitudes (4th ed. 1885), p. 11, 45, 257.

purtenant are ordinarily regarded as freely transferable and inheritable.[16] By referring to servitudes in the zone of "expected use" it would seem that the court implied that the acquisition of a servitude by aerial navigation in the lower stratum, although not interfering with the use then being made of the land, would prevent the owner from later taking permanent occupation of the space in which the servitude had been acquired. This situation might arise when farm land subsequently becomes valuable for city property.

Judge Hickenlooper, in a concurring opinion, intepreted the distinction between the upper and lower strata to imply that "although a single flight over the plaintiffs' land may not contsitute a trespass, such flights may be so continuous as in the aggregate to do so." He held this "highly technical question" was unnecessary for the present decision, was not involved in *Portsmouth* v. *United States,* supra, and the result illogical because "if the aggregate of a large number of flights constitutes a trespass it must be because each of said flights is itself a trespass." Judge Hickenlooper reads a great deal into the opinion of Judge Moorman that does not appear from the bare language used by the latter judge, and if Judge Hickenlooper's interpretation is correct his criticism would seem technically sound. However, by restricting rights in the upper stratum to an "action for nuisance and not trespass" Judge Moorman's opinion may possibly be construed to imply that an action of trespass will lie for a single invasion of the lower stratum. It is unfortunate, it would seem to the commentator, that the court did not express his conception of the rights of the landowner in the airspace in a manner that was not open to so many confusing interpretations. The evils of attempting to lay down rigid rules for the settlement of all future cases is recognized, but ambiguous statements do not help subsequent judges decide later cases upon their own facts.[17]

After having discussed the landowner's rights in airspace Judge Moorman proceeded to make clear that property rights were:

"unaffected by the regulation promulgated by the Department of Commerce,

16. 2 *Tiffany, Real Property* (2nd ed.), sec. 382, p. 1392.

17. The theory of the extent of private ownership in airspace implied by the court in its discussion of the rights of the landowner indicates that the court did not accept the theory advanced by the American Law Institute in their tentative restatement of the law of torts. The Committee's theory is that "ownership and possession extend upward indefinitely" but is subject to a public "easement of transit" at such altitudes as not to unreasonably interfere with the possessor's enjoyment of the surface: Tentative Draft No. 7, explanatory note appended to section 1002; 1931 U. S. Av. R. 280, 286. By definitely restricting the rights of the landowner in the upper stratum to an action of nuisance, the court denied that the owner had the ordinary rights of ownership "upward indefinitely." Moreover, if Judge Hickenlooper's interpretation of the majority of the court's opinion is correct, the landowner does not have an action of trespass against any single flight no matter at what height it is made. Surely an "easement of transit" does not imply that flights can be made without restriction unless an actual servitude upon the use and enjoyment of the surface is created. An easement of transit does not imply a right to perform acrobatics or train student pilots above private property although not amounting to a nuisance. Whether the dicta of the instant court is consistent with the complete denial ownership of unenclosed airspace recently advanced by the American Bar Association Committee on Aeronautical Law is not clear. The Committee would apparently limit the rights of the landowner to an action of nuisance in all cases. The right of the landowner to prevent the acquisition of servitudes upon his expected use of the surface is apparently in addition to the right to prevent a nuisance. The omission from the proposed Uniform Aeronautical Code of the statement of ownership found in the present Uniform State Law of Aeronautics was recently approved at a joint meeting of the Aeronautical Law Committee of the American Bar Association and the Aviation Committee of the Commissioners on Uniform State Laws: See page 285 of this issue.

under the Air Commerce Act of 1926, and adopted by the State of Ohio, requiring aeronauts to fly in rural sections at a height not less than 500 feet above the surface."

This result is believed sound, as the minimum safe altitude of flight established by the regulations is based on considerations for the safety of the airplane and would be unconstitutional if interpreted as a taking of property without compensation and without due process of law. In *Smith* v. *New England Aircraft Co.*[18] the Federal and Massachusetts regulations were held to place a limitation upon the landowners' property rights in that they permitted flying over private property above the minimum safe altitude of flight, but did not "prevent the plaintiffs from making any actual use they choose of the airspace above 500 feet in altitude." It was there justified under the interstate commerce and police power respectively on the ground that the regulations merely settled the conflicting interests existing between the landowner and the aviator in the disputed space.

Several observations may be made upon the type of relief needed by the landowner to adequately protect his interest according to the "necessities of the period." (A) *Annoyance from a single flight.* It is submitted that the landowner is generally not warranted in seeking court relief from a single flight of an airplane through the airspace above his property unless actual damage results or is imminent. In the *Neiswonger* case the flight of an airship at an altitude of 200 feet caused plaintiff's team to run away and physically injured the plaintiff; the court properly granted compensation.[19] Ordinarily the single flight of an airplane, even that of a large ship at a very low altitude, is not of sufficient duration or annoyance to cause substantial damage and warrant more than a nominal recovery of damages. Such suits are economically wasteful and would be of great harm to aviation although their allowance did not lead to closing the airspace above private land to flying. Exceptions to this assertion must be made for single flights which are imminently dangerous or made with a malicious intent. Weather conditions or the conditions of pilot or aircraft may unreasonably expose the unprotected landowner to the danger of the airplane crashing. Flights made for the purpose of annoying or of invading the privacy of a landowner by low flying or aerial photography, would clearly come within the type of flying which the landowner might reasonably seek to prevent.

Considerations of practical administration possibly indicate that public prosecutions by state or federal officials may very likely be the best way to prevent single dangerous flights. Most dangerous flying involves a violation of the federal licensing regulation for pilots and aircraft or the minimum safe altitude of flight regulation. The occasional advantage to the landowner is offset by the tremendous handicap to aviation which would follow from allowing a civil action against a single flight of an airplane. Flights for commercial exploitation or where spite can be proved probably may be classified with those flights which cause actual damage.

(B) *Annoyance from recurring flights.* The landowner is primarily interested in preventing recurring flights over his property that constitute the ordinary private nuisance, or impair the "value" of his property. Gen-

18. 270 Mass. 511, 170 N. E. 385 (1930).
19. *Neiswonger* v. *Goodyear Tire and Rubber Co.*, 35 F. (2d) 761 (1929).

erally a single act will not constitute a nuisance. How many flights will create a nuisance depends upon many elements—the use to which the land is put, the size of the plane, the height of flight, and the type of flying at the time. If easements or servitudes may be acquired by repeated flights through airspace, the landowner is interested in preventing such flights when their continuance annoys him or threatens to restrict the future development of his land. The right of privacy has only occasionally been recognized but with the increase of flying over country estates will probably become more important.[20] Repeated flights by different operators of airplanes may cause a nuisance and yet the flight or flights of no one operator alone be of sufficient annoyance as to constitute a nuisance. Such a situation would be highly possible in regard to property situated near an airport from which a great deal of private flying takes place. The action of nuisance would seem inadequate to provide relief against such annoyances and it is not clear how relief can be provided without allowing an action of trespass with all the abuses attendant to allowing such an action generally. With the exception of the incident last mentioned, the action of nuisance would appear to adequately protect the landowner from the annoyances created by airplanes flying over his property, especially if the air traffic rules were reasonably enforced.

It has been thought that the landowner was entitled to an action of trespass because of the greater ease with which such an action could be established. This greater ease is probably over-estimated. To establish an action for aerial trespass the plaintiff would have to prove that the flights took place directly above his particular land surface. If an action of trespass were not allowed against every flight above private property, and this is usually conceded, then the plaintiff would, in addition, probably have to prove that the flight came within such a zone as is designated by the terms "lower stratum," "effective possession," or "actual user." To prove an invasion of such a zone practically amounts to proving that flying at the altitude of the particular flight complained of may create a nuisance.[21] This additional burden will continue until presumptions establish the height at which airplane flights will amount to a trespass. This height will vary with the use to which the land is put and the size and nature of the aircraft. The result is that the burden of proof at the present time on the plaintiff who brings an action for aerial trespass is greater, at least under the prevailing zone theory of the extent of ownership, than if he had brought an action of nuisance directly. The plaintiff in a nuisance action need not prove that the airplanes flew directly over his land since airplane flights may create a nuisance whether directly over property or not. Without doubt the noise and danger from airplanes in flight are greater directly under the course of flight but are by no means confined to that area.

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20. *MacChesney*, "In Re: Rights of Land Owners with Reference to Operation of Aircraft" 1 JOURNAL OF AIR LAW 211, 215 (1930); *Logan*, Aircraft Law —Made Plain (1928), p. 22; *Zollmann*, Law of the Air (1927), p. 80-1; *Hazeltine* The Law of the Air (1911), p. 81-2. On the right of privacy generally, see *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442 (1902); *Hickman* v. *Maisey*, 1 Q. B. 142 (1893); *Von Thodorovick* v. *Franz Josef Beneficial Assn.*, 154 Fed. 911 (C. C., Pa., 1907); *Vassar College* v. *Loose-Wiles Biscuit Co.*, 197 Fed. 982 (D. C., Mo., 1912). See *Warren & Brandeis*, "The Right of Privacy," 4 Harv. L. Rev. 193 (1890); *Winfield*, "Privacy," 47 Law Quart. Rev. 23 (1931).

21. See Comment, 2 JOURNAL OF AIR LAW, 82, 88 (1931).

The difficulty of proving that a flight took place directly over the property belonging to the plaintiff is ably illustrated by the testimony introduced in the instant case, as set forth in the briefs of counsel. Three witnesses for the plaintiff "testified to more than fifty specific flights over plaintiffs' property at elevation from 75 to 400 feet in five days."[22] The pilots of the airplanes making these flights were all employees or students of the defendants' and testified that they had made the specific flights but *at no time over the property of the Swetlands.*[23] The testimony apparently differed not so much on the elevation at which the flying took place, but as to whether it took place over plaintiffs' property at all. The court does not mention this controversy or give any indication as to whose witnesses it believed. Moreover it is recognized that by going behind the facts stated in the judge's opinion and judging the case by the facts stressed in the brief or elsewhere, a situation other than that ruled upon by the judge becomes involved.[24]

A comparison of the opinions given in *Smith* v. *New England Aircraft Co.,* supra, with the two opinions in *Swetland* v. *Curtiss Airport Co.,* indicates to what extent the three judges differed in their interpretation of the rights of the landowners. Each court was confronted with a situation wherein an airport adjoining a country estate was claimed to be a nuisance. The details of the situations differ and probably account for the differences in the actual holdings. The language of the three courts however indicates that they differed in their theoretical conceptions of the landowner's rights in the airspace which may be discussed under the following headings.

1. *Authority of the Maxim "Cujus Est Solum Ejus Usque Ad Coelum" to Determine Air Rights:*

In the *Smith* case the plaintiffs did not contend that the maxim should be literally interpreted. The Court, on the other hand, "assumed" that the landowner did have property rights in the airspace to the extent necessary for the development of his underlying land.

In the *Swetland* case the plaintiffs relied upon the maxim, among other grounds, to establish their rights to exclusive control of the airspace above their property, but the *District Court* denied the literal interpretation of the maxim by refusing to enjoin flying at altitudes greater than 500 feet, and by asserting that "effective possession" marked the limit of the landowner's property rights.

In the *Swetland* case the *Circuit Court of Appeals* definitely discarded the maxim as of any force in determining property rights and openly recognized that rights in airspace must be determined "in relation to the necessities of the period." The court thereupon distinguished between rights in the upper and lower strata and recognized that the landowner has the dominant right of occupancy incident to the development of his land.

2. *Effect of the Statutory Establishment of a Minimum Altitude of Flight Upon Property Rights:*

In the *Smith* case the Massachusetts and Federal definition of "navigable

22. Appellant's brief, page 23.
23. Appellant's brief, page 23-4, and appellee's brief, page 12-3.
24. *Frank,* "What the Courts Do in Fact," supra, esp. p. 782.

airspace" and the regulation of 500 feet as a minimum altitude for flying over rural districts was held to be a limitation upon property rights which was constitutional because not "in excess of the permissible interference under the police power and under regulation of interstate commerce with rights of the plaintiffs in the airspace above that height over their land."

In the *Swetland* case the *District Court* states that there is nothing in either Federal or State "legislation to indicate that either legislative body * * * considered that there was involved the *taking* of any *property*," and that the establishment of a minimum safe altitude of flight cannot be considered a taking of property without due process of law. However it is uncertain whether the court did not place some reliance upon the minimum safe altitude of flight from the fact that it indicated that the height of effective possession and the limit of nuisance from flying would each be 500 feet, the altitude established for the minimum safe altitude of flight over non-congested districts.

In the *Swetland* case the *Circuit Court of Appeals* directly held that the minimum safe altitude of flight, promulgated under the Air Commerce Act and adopted by Ohio, did not determine property rights.

3. *Flying Over Plaintiffs' Property as Constituting a Trespass:*

In the *Smith* case the court found that flights "at altitudes as low as 100 feet" over the wood borderland of plaintiffs' estate constituted a technical trespass, but did not decide whether the few repeated flights directly over plaintiffs' dwelling house under 500 feet constituted a trespass. Above 500 feet the court held that flying did not constitute a trespass, presumably because of the Federal and State acts, supra.

In the *Swetland* case the *District Court* enjoined flying over plaintiffs' property at less than 500 feet on the ground that "such flying, if it would not constitute trespasses, would at least constitute the maintenance of a nuisance." The court implied that the landowner had an action of trespass against aerial invasions in the area of "effective possession," which he asserted in the first instance he would locate at 500 feet. The court nowhere directly stated that his injunction was based upon trespass.

In the *Swetland* case the *Circuit Court of Appeals* denied the assertion that every flight of an airplane was a trespass, and stated that defendants' flying in the instant case did not come within the "lower stratum" wherein plaintiffs' had peculiar property rights, although it recognized that at times there must be flying over plaintiffs' property "at a much lower altitude than 500 feet." As earlier discussed, the court does not say whether an action of trespass could be brought against a single flight of an airplane no matter how low, but that an action to prevent the imposition of a servitude might be based presumably on repeated trespasses.

4. *Flying Over Plaintiffs' Property as Constituting a Nuisance:*

In the *Smith* case the court apparently did not consider whether flying itself was a nuisance because the injunction was sought "solely on the ground of trespass and the nuisance resulting from its continuance." The injunction was not sought on the ground that the noise and danger incident to flying amounted to a nuisance in itself, but only to prevent the recurrence of the trespasses.

In the *Swetland* case the *District Court* held that flying over plaintiffs' property in taking off and landing at less than 500 feet would constitute a nuisance "in view of the magnitude of defendants' contemplated operations." In regard to flying over 500 feet the court found that there was no evidence that such flying constituted a nuisance. Apparently the court only considered the element of noise as creating the nuisance and did not expressly consider the danger element.

In the *Swetland* case the *Circuit Court of Appeals* recognized that the flights of airplanes overhead might become a nuisance. The court did not specifically label any of the flights here involved to be of that character, although it found that "the plaintiffs will suffer much annoyance from the noises made by this low flying," i. e., the flying over plaintiffs' property necessarily involved in taking off and landing when the wind is from the east or west, which flying would often "be at a much lower altitude than 500 feet."

5. *The General Operation of an Airport as Constituting a Nuisance:*

In the *Smith* case the Master in Chancery found that the "site was reasonable and proper for a flying field" and that the airport was "properly maintained and reasonably conducted." In that case woodland separated the plaintiffs' residence from the airport by 3000 feet. The report of the Master was accepted by both parties. Apart from flying over plaintiffs' property the court found that "upon the findings of the Master there is no sound ground for injunctive relief on the theory that the acts of the defendants constitute a nuisance."

In the *Swetland* case the *District Court* found that the airport was not a nuisance *per se,* and that the airport was "suitably located" as judged by the nature of the surrounding country. Consideration was given to the noise involved in warming up the airplanes and in taking off and landing which if found to be a nuisance could not be abated without closing the airport entirely. Such annoyances were found not sufficient to create a nuisance. Depreciation in value in plaintiffs' property as a country estate was dismissed as too problematical and insufficient alone for closing the airport without other elements amounting to a nuisance. The court considered objections to the lighting system for night operation, an integral element in defendant's plans, prematurely raised on the ground that the effect of the system depended on the kind installed.

In the *Swetland* case the *Circuit Court of Appeals* enjoined the operation of the airport as a whole. The Court does not speak of the airport as being a nuisance *per se.* The court differed from the lower court in concluding that the evidence demonstrated that the noise, danger, crowds, property depreciation, and night operations, all incident to the airport "as now located", would be of sufficient annoyance to constitute a nuisance, and could not be abated without moving the airport.

6. *Manner of Operating Airport as Creating a Nuisance, Other Than Flying Over Private Property:*

In the *Smith* case the parties accepted the Master's report which found that the airport was "reasonably conducted," and the court did not discuss annoyances from the particular manner in which the airport was operated.

In the *Swetland* case the *District Court* analyzed the manner of operating the airport in detail. The dust blown on plaintiffs' land from the airplanes warming up and taking off, and the distributing of circulars from the air in such a manner as to fall upon plaintiff's land were found abatable nuisances. Both of these elements could be prohibited without impairing the general operation of the airport. The manner provided for parking automobiles and the handling of the crowds were found no more annoying than the crowds attracted by amusement parks which had never been considered to constitute nuisances. The other operations considered by the District Court were of such a nature that they could not be abated without closing the airport.

The *Circuit Court of Appeals* did not expressly consider the blowing of dust, the dropping of circulars, the highway congestion, or the crowds. The defendants did not appeal from the injunction in regard to the blowing of dust and dropping of circulars. The court placed considerable emphasis upon the fact that defendants' aviation school, which is not indispensable to the operation of an airport proper, would greatly increase the noise and danger because of the number of take-offs and landings that students make in the process of learning to fly.

EDWARD C. SWEENEY.

COMMENTS

CHATTEL MORTGAGE — VALIDITY AS AFFECTED BY FAILURE TO REGISTER TRANSFER.—[Illinois] Plaintiff's assignor, the Associated Aircraft, Inc., sold an airplane, duly registered under the United States Air Commerce Act, to one Ramsay, who gave a chattel mortgage to the aircraft company to secure the balance of the payments. This mortgage was duly filed in the recorder's office of Cook County, Illinois, but the plane was never registered in the name of Ramsay with the Department of Commerce. Shortly thereafter Ramsay brought the aircraft to the hangar of the defendant, Blue Bird Air Service, Inc., who at the time of the trial held a bill of $723.55 for storage and materials furnished the airplane. The license card, issued by the Department of Commerce, and exhibited in the plane, showed it to be licensed in the name of Associated Aircraft, Inc., the mortgagee, and defendant assumed from this evidence that the plane was owned by the aircraft company. The defendant failed to search the records for any prior mortgages or liens upon the plane. Upon defendant's refusal to deliver the plane to Ramsay except upon the payment of $723.55, plaintiff brought this action in replevin. The lower court adjudged that the lien of defendant, Blue Bird Air Service, Inc., was superior to plaintiff's chattel mortgage, holding that plaintiff could recover the plane only upon paying to defendant the amount of the latter's lien. *Held,* on appeal to Illinois Appellate Court, first district, that plaintiff's chattel mortgage was superior to defendant's lien. Judgment reversed. *Atlas Securities Co.* v. *Ramsay,* 262 Ill. App. 559 (1931).

Defendant in sustaining its claim was confronted with the well settled rule in Illinois that the lien given to artisans under Cahill's St. 1929, Ch. 82, paragraphs 45 and 48, is subject to any bona fide chattel mortgage recorded prior to the commencement of the lien. *Ehrlich* v. *Chapple,* 311 Ill. 467,

143 N. E. 61 (1924). Although a different rule may obtain where the mortgagor acts under the express or implied consent of the mortgagee—*Shaw* v. *Webb*, 131 Tenn. 173, 174 S. W. 273 (1915)—no defense of this kind was raised in the instant case.

To evade the effect of the above rule, defendant was forced to rely upon two propositions: (1) The mortgage given plaintiff was not a bona fide one because the transfer was not registered with the Department of Commerce in compliance with section 18 of the Air Commerce Regulations; and (2) The failure of plaintiff's assignor to do its legal duty in registering the transfer with the Department of Commerce, thus permitting defendant to assume the mortgagee was the owner, estops plaintiff from asserting the superiority of its lien.

Section 18 of the Air Commerce Regulations (Aero. Bul. No. 7) of the Department of Commerce reads in part as follows: "On the date of sale or transfer of title of licensed aircraft, the recorded owner *shall* report in writing to the Aeronautics Branch, Department of Commerce, Washington, D. C., giving the date and place of sale or transfer and the name and residence of the purchaser."

Thus there was squarely presented to the court the questions whether compliance with the above regulation was mandatory and whether non-compliance rendered any transfer void and of no effect. Neither the court nor this commentator was able to find any reported decisions construing this section. The court in its decision easily evaded any direct interpretation of the clause, relying on admissions of defendant's counsel to the effect that: (1) The ownership of the plane was in Ramsay, and (2) The failure to make registration of the transfer of title to Ramsay did not render the sale void. The court also relied upon a rather questionable use of burden of proof, inferring that since it was not disclosed in the evidence that the recorded owner (plaintiff's assignor) did not report the transfer in compliance with the above section, it must be assumed that it did comply by making the required report. In view of the stipulated fact that the plane was not registered in Ramsay's name with the Department of Commerce, the court's assumption seems somewhat violent. The court, by using the above reasoning, thus decided this phase of the case without adding any enlightenment on the interpretation of the quoted section.

In hazarding any opinion as to the effect to be given this section, without the aid of any decision immediately in point, two situations seem sufficiently analogous to bear some comment.

1. Statutes in several of the states regulate sales of second hand automobiles. Some states require the filing of the bill of sale with the Secretary of State (Colorado, Sec. 7, C.7, L. 1919). In others a transfer of license, receipt, and bill of sale between vendor and vendee satisfy the requirements (Texas, Vermon's Ann. Pen. Code Supp. 1922, Arts. 1617¾c—1617¾f). Under these and similar statutes the question of the validity of a transfer of a second hand automobile without complying with the statute has been raised in many forms. One group of cases holds that such sales are invalid for non-compliance: *State* v. *Cox*, 306 Mo. 357, 268 S. W. 87 (1924) (invalid sale does not pass insurable interest); *Curry* v. *Iowa Truck and Tractor Co.*, 193 Ia. 397, 187 N. W. 36 (1924) (principal whose agent sold without authority may recover back the car on theory no title passed by failure to

register the transfer); *Crandall* v. *Shay,* 61 Cal. A. 56, 214 Pac. 810 (1923) (attachment on car for debt of vendor before registration of transfer held to be a superior lien).

The second and larger group of cases holds that sales of second hand automobiles are valid notwithstanding any failure to comply with the statute: *Hennessey* v. *Automobile Owners Ins. Assn.,* 282 S. W. 791 (Tex. 1926) (insurable interest passes by sale notwithstanding non-compliance); *Littell* v. *Brayton,* 70 Cal. 286, 201 Pac. 34 (1921) (lien of mortgagee-vendor superior to garage lienor despite failure to register transfer); *Gaub* v. *Mosher,* 3 N. J. Misc. Rep. 605, 129 Atl. 253 (1925); *Commercial Credit Co.* v. *Schreyer,* 120 Oh. St. 568, 166 N. E. 808 (1929) (recorded mortgage on car held valid as against subsequent mortgagee, though statute as to transfers had not been complied with at time of execution of first mortgage); *Carolina Discount Corporation* v. *Landis Motor Co.,* 190 N. C. 157, 129 S. E. 414 (1925); *Amick* v. *Exchange State Bank,* 164 Minn. 136, 204 N. W. 639 (1925); *Hartford Fire Ins. Co.* v. *Knight,* 146 Miss. 862, 111 So. 748 (1927) (insurable interest transferred).

This apparent conflict is easily explained, however, when it is noted that the statutes of California, Iowa, and Missouri, involved in the former group of cases, include an express declaration of invalidity, while the statutes of the other states are silent upon this point. It is to be noted that Section 18 of the Regulations of the Department of Commerce likewise does not include an express declaration of invalidity.

The courts in interpreting this class of statutes profess to look to the purpose sought to be accomplished, and rightly hold that the statutes were passed for the benefit of the state in enforcing taxation and in detecting automobile thefts. Therefore the state alone can attack transfers which do not comply with the statute. Applying a similar test to Section 18, it would seem that the purpose of the regulation is to facilitate inspection of aircraft, so that planes not airworthy will not be used in interstate commerce. The provisions of Section 20 of the Regulations would seem to bear out this contention.

It is submitted then that the interpretation applied by the courts to automobile transfer statutes might well be applied to Section 18, and transfers of airplanes failing to comply with this regulation should nevertheless be valid, except as against the federal government. Under this interpretation the mortgage in question in the instant case would be a bona fide one and defendant's lien would be inferior to it.

2. The second situation, to some extent analogous to the Regulation here in question, is the statute requiring registration upon the sale of a ship. The Federal statute provides: "Whenever any vessel, which has been registered, is, in whole or in part, transferred to a citizen of the United States, * * * the vessel shall be registered anew, by her former name, according to the directions hereinbefore contained, otherwise she shall cease to be deemed a vessel of the United States * * * ": 46 U. S. C. 39. Under this statute it has been held that a change of the registry is not necessary in the sale of a ship to transfer the property in it, the effect of not obtaining a new registry being merely that the ship loses the privilege of an American bottom: *Hatch* v. *Smith,* 5 Mass. 42 (1809).

In cases involving ships, the facts of which are closely analogous to those of the instant case, it has been held that a mortgagee-vendor, who has allowed his name to remain on the registry as owner of the vessel, cannot be held personally liable for repairs upon the vessel, and this is true even though the claimant performed the services in actual reliance upon the credit of the registered owner: *Davidson* v. *Baldwin,* 79 Fed. 95 (C. C. A. 6th, 1897); *Calumet and Hecla Mining Co.* v. *Equitable Trust Co.,* 275 Fed. 552 (S. D., N. Y., 1919). The vendor's allowing his name to remain on the registry is not enough to work an estoppel against him: *The Boise Penrose,* 22 F. (2d) 919 (C. C. A. 2nd, 1927). These cases would seem to be strong authority for holding in the instant case that the plaintiff could not be held personally liable for the materials furnished the plane, and thus by inference that the transfer was valid even as against third persons without registering the transfer as required by Section 18.

In the light of the two analogies discussed above, it would seem that these conclusions might be drawn as to the interpretation of Section 18 of the Regulations of the Department of Commerce: (1) The requirement of registration of transfers of airplanes is merely an administrative measure which does not bear any essential relation to the contract of sale entered into between the parties; (2) The failure to register the plane as provided for in this section does not void the sale; and (3) A recorded chattel mortgage on a plane in possession of the mortgagor is valid and superior to rights of subsequent purchasers or lienors, although the transfer of the plane to the mortgagor was not registered with the Department of Commerce.

The case of *The Boise Penrose,* supra, would also seem to be strong authority against the defendant's contention that the conduct of plaintiff's assignor in failing to register the transfer estopped it from asserting the priority of the mortgage. The court, however, disposes of this point by pointing out that neglect to seek information that is easily accessible precludes a party from claiming the benefit of an estoppel: *Vail* v. *Northwestern Mutual Life Ins. Co.,* 192 Ill. 567, 61 N. E. 651 (1901). As the court points out, if defendant had examined the records in the county Recorder's office, it could easily have been ascertained whether the plane was mortgaged. However the records were not checked and defendant must pay the penalty for negligence.

RICHARD N. HUNTER.

GASOLINE TAX—COMMERCE—STATE SALES TAX ON GASOLINE USED IN INTERSTATE COMMERCE.—[New Mexico] Plaintiff was an interstate air carrier making one stop in the state of New Mexico, where its planes were refueled. New Mexico statutes imposed an excise tax of five cents per gallon on all gasoline used or sold within the state: Comp. Stat. N. M. (1929), secs. 60-101 and 60-203. If the gasoline was purchased within the state, the tax was levied upon the sale; but if the fuel was purchased outside of the state, the tax was levied upon the use within the state. Plaintiff brought suit to enjoin the state comptroller from enforcing both sections of the statute, and obtained the reliefs sought in the trial court. *Held,* on appeal, that the tax upon the use, as applied to plaintiff, constitutes a direct burden upon interstate commerce, and is therefore repugnant to the

Federal Constitution. The sales tax deals with purely intrastate commerce and is therefore valid. The trial court correctly enjoined the enforcement of the use tax, but erred in enjoining the sales tax. Judgment reversed in part. *Transcontinental and Western Air, Inc.* v. *Lujan,* 232 C. C. H. 2016; U. S. Daily, Dec. 29, 1931 (Sup. Ct., N. M. Decided December 21, 1931). A rehearing is now pending before the Supreme Court of New Mexico.

There seems to be no question of the invalidity of a tax on the "use" of fuel by an instrumentality of interstate commerce. That problem was settled by *Helson* v. *Kentucky,* 279 U. S. 245, 49 S. Ct. 279 (1928), holding unconstitutional a tax on gasoline used within the taxing state but purchased outside the state by a ferry engaged in interstate commerce.

The first few cases involving taxes on fuel consumed in interstate air transportation, whether upon the use or sale thereof, considered that the *Helson* case, supra, was controlling. Oklahoma's statute was thus overthrown: *United States Airways* v. *Shaw,* 43 F. (2d) 148 (W. D. Okla., 1930); comment, 2 JOURNAL OF AIR LAW 600 (1931). Enforcement of the statute involved in the instant case was enjoined on the same principle: *Mid-continent Air Express Corporation* v. *Lujan,* 47 F. (2d) 266 (D. C., N. M., 1931); comment 3 JOURNAL OF AIR LAW 132 (1932). To the same effect as the Mid-continent case is the decree in *Transcontinental & Western Air Lines, Inc.* v. *Asplund,* 232 C. C. H. 1504 (Dist. Ct., 1st Jud. Dist., N. M., Dec. 18, 1930). The Wyoming tax was sustained only because its proceeds were used to maintain municipal airports, and thus the tax constituted a charge for the use of such airports: *Boeing Air Transport Inc.* v. *Edelman,* 51 F. (2d) 130 (D. C., Wyo., 1931); this case is now pending appeal before the United States Circuit Court of Appeals for the Tenth Circuit. All three of the aforementioned Federal District Court cases were heard before statutory three-judge courts on applications for preliminary injunctions.

The above courts came to error in failing to recognize the distinction between a tax on the use of gasoline and a tax on the sale thereof. The Supreme Court of the United States has said, "The difference between an excise tax based on sales and one based on use of property is obvious and substantial": *Hart Refineries* v. *Harmon,* 278 U. S. 499, 503, 49 S. Ct. 188 (1929). The statutes in the above cases levied a tax upon the sale of gasoline as well as upon the use. A tax upon the sale of gasoline was sustained by a statutory three-judge Federal court in South Carolina. The sale being consummated within the state is a pure intrastate transaction. What the purchaser intends to do with the gasoline afterwards does not affect the power of the state to tax. An intrastate sale of an article which will ultimately enter into interstate commerce is analogous to the production of an article intended for interstate commerce. Both the intrastate sale and the production may be taxed by the state of the situs of the goods: *Eastern Air Transport, Inc.* v. *South Carolina Tax Commission,* 52 F. (2d) 456 (E. D., S. C., 1931). For a tax on the mining of coal intended for interstate commerce see *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245, 43 S. Ct. 83 (1922). Dismissing the suit for want of jurisdiction on the ground that the consumer of the gasoline, an interstate trucking company, is in no position to contest the tax, a statutory court of three judges incidentally distinguished the sales from the use tax: *Central Transfer Co.* v. *Commercial Oil Co.,* 45 F. (2d) 400 (E. D., Mo., 1930).

The *Eastern Air Transport* case, supra, was affirmed by the Supreme Court of the United States on March 14, 1932 (as per telegram received from Charles E. Cropley, clerk of the U. S. Supreme Court). The validity of state taxation on the sale of gasoline to persons engaged exclusively in interstate commerce is now authoritatively settled, and the reasoning of the instant case may be regarded as the sounder.

RAYMOND I. SUEKOFF.

LIFE INSURANCE — INTERPRETATION OF "PARTICIPATION IN AERONAUTIC OPERATIONS."—[Tennessee] The complainant in the capacity of trustee was sole beneficiary of three policies of insurance on the life of the deceased, each of which provided for double indemnity in case of accidental death except where such death resulted "from participation in aeronautic or submarine operations." The deceased was killed while riding as a free passenger on purely private business in a plane owned by a company of which he was president. It had been his custom to make use of the company's planes; when he did so he bought the gasoline and oil and paid the pilot. *Held,* the death of the insured resulted from "participation in aeronautic * * * operations" and double indemnity should be denied the complainant. *First National Bank of Chattanooga* v. *Phoenix Mutual Life Ins. Co.,* 232 C. C. H. 2003 (D. C. Tenn., December 15, 1931).

Courts have often and consistently decided that a passenger "participates" but does not "engage" in aviation. (See cases reviewed in a comment upon *Gibbs* v. *Equitable Life Assurance Co.,* 3 JOURNAL OF AIR LAW 135.) This distinction, though widely adopted, is probably illogical. The history of it is illuminating. It was presaged in *Bew* v. *Travelers' Ins. Co.,* 95 N. J. L. 533, 122 Atl. 859 (1921), where the phrase for interpretation was "participating in . . . aeronautics." The following words are found in that decision: "If it had been intended to confine the application of this provision to those who pilot or manage the physical operations of such vessels, it would probably have been expressed by using some such language as 'engaging in the piloting, management or operation of aeronautical vessels.'" Four years later the Indiana Appellate Court expressly noticed the fact that there was a wide difference between such a phrase and the words "engaged in aviation." Thereupon that court decided that a passenger "engaged" as well as "participated" in aviation: *Masonic Accident Ins. Co.* v. *Jackson,* 147 N. E. 156 (Indiana, 1925).

This decision was appealed to the Indiana Supreme Court and possibly it would have been affirmed had not the Arkansas Supreme Court on November 28, 1927, handed down the decision in *Benefit Association Railway Employees* v. *Hayden,* 175 Ark. 565, 299 S. W. 495 (1929), wherein for the first time it was unequivocably asserted that, while a passenger did participate, yet he definitely did not engage in aviation. The Arkansas decision was based upon an analogy to a line of cases in which it had been determined that death resulted from "engaging in military or naval service" only when the insured was "doing something connected with the military service, in contradistinction to death while in the service due to causes entirely or wholly unconnected with such service."

Obviously this analogy is imperfect and quite inconclusive, for the cases cited decided merely that there should be a demonstrable causal relation

between the death and the risks peculiar to military service, while a passenger killed in the crash of an airplane is undeniably the victim of a risk of aviation. Yet the Tennessee decision convinced the Supreme Court of Indiana that the distinction between the words "participating" and "engaging" was a real and important one, so it reversed the saner decision of the Appellate Court: *Masonic Accident Ins. Co.* v. *Jackson,* 200 Ind. 472, 164 N. E. 628 (1929). In this opinion the faulty logic of the Tennessee Court was incorporated without alteration. Subsequent decisions in other states interpreting the word "engaging" have made mere references to the reasoning of the *Hayden* case: *Price* v. *Prudential Ins. Co.,* 98 Fla. 1044, 124 So. 817 (1929); *Gits* v. *New York Life Ins. Co.,* 32 F. (2d) 7 (C. C. A. 7th, 1929); *Flanders* v. *Benefit Association of Railway Employees,* 42 S. W. (2d) 973 (Mo., 1931). Note should be taken that *Peters* v. *Prudential Ins. Co.,* 133 Miss. 780, 233 N. Y. S. 500 (1929) was turned not upon this question but upon the necessary military character of the aviation implied from the carelessly drafted phrasing of the policy involved.

In the instant case the Tennessee Court had the option to declare either that the additional word "operations" gave this case an anomalous character, or to repeat the touchstone word "participation" and then drop it in all docility into the settled category. The first course was the more difficult and the court chose not to follow it. Had the phrase been "engaging in aeronautic operations," as it had been in the *Gits* case, supra, then that would have been another matter, but the word "participation" was conclusive in the mind of the court.

And so, largely because the Arkansas Court once strayed after a capricious analogy, the issues in the present case were determined against the plaintiff. Certainly, despite the pleasant things that the courts have endeavored to say about the wisdom of those precedents which made their opinions easy to write, the elaborate law of these cases is quite indefensible. The insurance policies interpreted were written before there had been any adjudication of similar policies, and it is ridiculous to argue that the contracting parties recognized any difference in meaning between the words "participate" and "engage." In common speech the words are used almost indiscriminately, and it is an axiom of insurance law that the usages of common speech are the criteria of interpretation: *Houlihan* v. *Preferred Acc. Ins. Co.,* N. Y. 337, 89 N. E. 927 (1909). Under this rule of interpretation all of these cases might be decided either for the plaintiff or the defendant, but such a distinction as the courts have made is absurdly artificial. The courts possibly were actuated by a prejudice in favor of the insured and a recognition that the risks from transport aviation are less today than when the policies involved in litigation were written.

GEORGE BALL.

NEGLIGENCE—COMMON KNOWLEDGE—AIR TRAFFIC REGULATIONS—ACROBATIC FLYING AT LOW ALTITUDE.—[Texas] The defendant, owner and operator of an airplane, for compensation took plaintiff's minor son, age 16, and another boy for two short sight-seeing or pleasure trips over their home town. During the course of the second ride the defendant "looped the loop" at a low altitude over houses, buildings and haystacks; while attempting a second loop the tail of the machine struck a stack of corn and the plane

crashed to the ground, resulting in the death of plaintiff's son. The defendant testified that in making a loop he lost altitude of about 300 feet. The jury returned a verdict for the plaintiff and found specifically that the defendant began the fatal loop at an altitude of between 200 and 400 feet and that such action constituted negligence. *Held,* on appeal, that there was ample evidence from which the jury could find negligence. Judgment affirmed. *English* v. *Miller,* 43 S. W. (2d) 642 (Tex. Ct. of Civ. App., 1931).

The principal issue submitted to the jury was whether defendant was negligent in attempting acrobatic flying at such a low altitude. No evidence was offered of any mechanical defects in the plane and it was admitted that defendant was a trained and experienced pilot. The defense of assumed risk set up by the defendant in his pleadings seemed to play no important part in the case and is not discussed on review. Since, apparently, no experts were called to testify as to what constitutes negligent acrobatic flying the appeals court considers as its chief problem whether the jury could properly find negligence from the circumstantial facts that defendant attempted to "loop the loop" at an altitude of not over 400 feet and that he lost altitude of at least 300 feet on each successful attempt. Other questions raised by the decision are the pertinency of the Federal Air Traffic Rules and the applicability of the doctrine of *res ipsa loquitur.*

Relying upon the general principle that "negligence may be established by circumstantial evidence, and the cause of an action may be inferred from such evidence," the court invokes in support of its holding that the evidence justified a finding of negligence, the so-called theory of "common knowledge." This theory, a part of the general doctrine of judicial notice, means simply that as to those facts and principles, which are of such universal knowledge that they may be regarded as part of the common knowledge of all persons, no evidence need be offered: *Wigmore,* Evidence (2nd Ed. 1923), secs. 2565, ff; *Jones,* Commentaries on Evidence (2nd Ed. 1926), sec. 424. Like the general doctrine of judicial notice, this theory is thought of as applying primarily to the tribunal itself, i. e., the judge. But by analogy it is applicable to the jury as well: *Wigmore,* supra, sec. 2569; *Jones,* supra, sec. 471. "Jurors should take with them their knowledge and experience of affairs, and are not only at liberty to use the same in drawing conclusions from the evidence, but ought to make use of such knowledge": Barker, J., in *McGarrahan* v. *N. Y. & H. R. Co.,* 171 Mass. 211, 50 N. E. 61 (1898).

The theory of common knowledge has been consistently used with reference to the operation and effect of natural forces and such mechanical and scientific facts as are supposedly the universal knowledge of all: *Chiulla de Luca* v. *Park Commrs.,* 94 Conn. 7, 107 Atl. 611 (1919) (noticed judicially that a tall tree is a place of greater danger in a thunder storm); *Board of Education* v. *Ind. Comm.,* 301 Ill. 611, 134 N. E. 70 (1922) (notice taken of the dangerous nature of a buzz saw); *People* v. *Linde,* 341 Ill. 269, 173 N. E. 361 (1930) (noticed that heavy trucks cause damage to highways). The doctrine has been applied to various well known facts concerning various modern improvements and inventions: *L. & N. Ry. Co.* v. *Geoghagen,* 203 Ky. 198, 261 S. W. 1104 (1924) (railroads); *Theisen* v. *Detroit Taxicab & Transfer Co.,* 200 Mich. 136, 166 N. W. 901 (1918) (telephones); *Penisular Tel. Co.* v. *McCaskill,* 64 Fla. 420, 60 So. 338 (1912) (electrical

appliances and equipment); *Westfalls Storage, Van & Express Co.* v. *City of Chicago,* 280 Ill. 318, 117 N. E. 439 (1917) (automobiles); *Gust* v. *Muskegon Co-op. Oil Co.,* 226 Mich. 532, 198 N. W. 175 (1924) (gasoline).

As long ago as 1914 a New York court stated: "Although airplanes are of comparatively recent invention, yet we think their use has become so general that the term "airplane" may now be taken to have a specific meaning and to describe a general type of machine": *Platt* v. *Erie County Agricultural Society,* 164 App. Div. 99, 149 N. Y. S. 520 (1914) (judicial notice was taken of the chief mechanical features of aircraft and the methods of their operation). In 1930 a Massachusetts court took judicial notice of "facts of common knowledge" concerning navigation of the air: *Smith* v. *New England Aircraft Co.,* 270 Mass. 571, 170 N. E. 385 (1930) (noticed that aviation is an important modern problem, that it is impossible to confine the flight of aircraft to the space over existing ways, etc.). These authorities indicate that well known features of aircraft operation may rightly be included within the scope of the doctrine of common knowledge.

In the instant case the problem reduces itself to this: Does the average juryman know enough about the operation of airplanes to say that an attempt to "loop the loop" at an altitude of less than 400 feet over buildings and haystacks, coupled with the fact that each loop results in an altitude loss of 300 feet, constitutes negligence? It is not difficult to agree with the court that the experience of the average man of today has been wide enough to justify him in finding negligence from these facts. One hundred feet, or less, is obviously a small margin of safety for such acrobatics.

In many airplane accident cases involving injury or loss of life wide use has been made of expert testimony: *Hagymasi* v. *Colonial Western Airways,* 1931 U. S. Av. R. 73 (Superior Ct. N. J., 1931) (experts testified as to overloading of the plane, condition of the engine, etc.); *Allison* v. *Standard Air Lines, Inc.,* 1930 U. S. Av. R. 292 (U. S. D. C., S. D., Calif., 1930) (experts testified as to weather conditions, etc.). It will be seen that these cases involved scientific and mechanical facts upon which the testimony of experts could shed much light. It is doubtful if the theory of common knowledge would be applicable to them, for the intricate principles of aerial navigation and meteorology are not the knowledge of the average man. In the instant case experts could no doubt have been asked their opinions as to safe altitudes for acrobatic flying; but the sole question being whether defendant was negligent in stunting at such a low altitude, it is improbable that experts could have added greatly to the jury's ability to solve the problem.

From the facts as found by the jury the defendant was violating at least two rules of the Air Traffic Rules formulated by the Department of Commerce under authority of a provision in the Air Commerce Act of 1926 (49 U. S. C. 173 e): (1) He was performing acrobatic stunts (semble) over a congested area of a city, town or settlement in violation of section 72 (2) (a); (2) He was acrobatically flying an airplane while carrying passengers for hire in violation of section 72 (2) (d): Air Traffic Rules, Aero. Bul. No. 7 (1932), ch. 7. The only reference by the court to these provisions is in the following statement: "The Air Commerce Regulations of the United States inhibit acrobatic flying in an airplane by any person carrying passengers for hire, but such regulations were not pleaded, and,

had they been, appellant was evidently engaged in intrastate flying, and the Legislature of this state did not adopt the rules and regulations of the federal government until some time after January 26, 1928" (the date of the accident).

Contrary to the implications of the above statement, the federal Air Traffic Rules purport to apply to all flights, both intrastate and interstate (Sec. 67, Air Traffic Rules), and Texas has only adopted the licensing provisions of the federal regulations: Laws 1929, Ch. 285. The constitutionality of the Air Traffic Rules in general has been upheld on the ground that the federal government has wide police powers with reference to interstate commerce: *Smith* v. *New England Aircraft Co.,* 270 Mass. 571, 170 N. E. 385 (1930). As applied to flights wholly intrastate the altitude rules have been supported upon the "burden theory" of interstate commerce: *Swetland* v. *Curtiss Airports,* 41 F. (2d) 929 (N. D., Ohio, 1930). Analogies are drawn to the cases involving railroads, water navigation, and telegraph companies in which it has been held that Congress may regulate intrastate commerce in these fields if necessary to preserve the freedom, well-being, or safety of interstate commerce: see *Logan,* "The Interstate Commerce 'Burden Theory' Applied to Air Transportation," 1 JOURNAL OF AIR LAW 433 (1930); Note, 1 JOURNAL OF AIR LAW 359 (1930) Note, 3 JOURNAL OF AIR LAW 122 (1932).

But a lower federal court decision, though apparently supporting the burden theory, has expressed doubts concerning the validity of the altitude regulations when applied to a flight wholly intrastate: *Neiswonger* v. *Goodyear Tire and Rubber Co.,* 35 F. (2d) 761 (N. D., Ohio, 1929). The court said: "It is a little difficult to see in what respect interstate aircraft navigating at or above the prescribed elevation can be endangered or interfered with by intrastate craft moving in a lower plane. However dangerous this may be to the intrastate craft and to persons and property on the ground, the danger to interstate flight is not apparent." See also *Hotchkiss,* Aviation Law (1928), sec. 57.

The words of the above decision apply with even greater force to the stunting regulations involved in the instant case. It may be highly desirable that acrobatic flying with passengers be prohibited and that no stunting be performed over congested areas; but it is doubtful if either of these regulations is necessary for the protection of the freedom, safety, or well-being of interstate commerce. They seem designed to protect the public at large rather than interstate air traffic. Furthermore, in the instant case, defendant's flight was for a few miles over a small town far in the interior of Texas where there may have been no interstate air traffic within many miles.

The court declared that the doctrine of *res ipsa loquitur* would be applicable under the facts revealed by the record but for the fact that plaintiff alleged specific acts of negligence, for which reason the doctrine could not be invoked. The court follows the settled Texas rule that allegation of specific acts of negligence bars the plaintiff from relying upon the presumption of *res ipsa loquitur: Johnson* v. *Galveston R. Co.,* 66 S. W. 906 (Tex. Civ. App., 1902); *Wichita Valley Ry. Co.* v. *Helms,* 261 S. W. 225 (Tex. Civ. App., 1924). The same rule is followed in other jurisdictions: *Roscoe* v. *Metropolitan St. Ry. Co.,* 202 Mo. 576, 101 S. W. 32 (1907);

White v. *Chicago & G. W. Ry. Co.,* 246 Fed. 427 (C. C. A. 8th, 1917). But in many other jurisdictions this rule is rejected; even though the plaintiff alleges specific acts of negligence he may still rely upon the presumption: *Stewart* v. *Barre,* 94 Vt. 39, 111 Atl. 526; *First* v. *Capitol Park Realty Co.,* 98 Conn. 627, 120 Atl. 300, 29 A. L. R. 17 (1923). On the general subject see *Niles,* "Pleading Res Ipsa Loquitur," 7 N. Y. L. Quart. Rev. 415 (1929).

The courts adopting the strict rule followed by the Texas decisions reason that the rule of *res ipsa loquitur* is indulged because the plaintiff, not being familiar with the instrumentalities used, has no knowledge of the specific acts concerning the injury; but if plaintiff by his petition shows that he is sufficiently advised concerning the exact negligent acts causing the injury as to plead them specifically, then the reason for the presumption has vanished: *Roscoe* v. *Metropolitan St. Ry. Co.,* supra. As a matter of logical symmetry in pleading this reasoning can no doubt find support: see *Niles,* supra, 423-25. But there is ground for saying that the strict rule works undue hardship on the plaintiff in an airplane accident case. He must elect whether to rely upon specific allegations or the presumption of *res ipsa loquitur.* He may be reluctant to rely upon the presumption, for the law with regard to airplane accidents is as yet so nebulous that it can hardly be predicted whether a court will allow the use of the doctrine: see *Curtiss Flying Service, Inc.,* v. *Seaman,* 231 App. Div. 867, 247 N. Y. S. 251 (1930) (*res ipsa loquitur* held applicable); *Wilson* v. *Colonial Air Transport Co.,* 1931 U. S. Av. R. 109 (Municipal Ct., Boston, 1931) (doctrine rejected); *Osterhout,* "The Doctrine of Res Ipsa Loquitur as Applied to Aviation," 2 Air L. Rev. 9 (1931). In the present formative state of the law it would seem better to permit plaintiff to make all the proof he can in regard to the cause of the accident, and then, if his best attempt has failed, to give him the benefit of *res ipsa loquitur.*

JOHN T. MATTHEWS.

WORKMEN'S COMPENSATION—PRIVATE PILOT AS AN EMPLOYEE.—[Illinois] The defendant employer was a merchandise manager for Mandel Bros., in Chicago. He owned an airplane which he used for both business and pleasure trips. The plaintiff's husband was a pilot. By an agreement between the defendant and the pilot the pilot, when not otherwise engaged, was to pilot the defendant's plane upon the request of the defendant or the defendant's brother-in-law. For his services the pilot was to be paid $10. per hour of actual flying time, and if the flight lasted more than an hour he was to be guaranteed at least $25. per day. He was to be, and had in the past been paid by the defendant. Prior to the accident the defendant had filed with the Industrial Commission a written acceptance and election to be bound by the Compensation Act, according to the provisions of the Statute, and had also taken out Workmen's Compensation insurance to cover this pilot. On September 14, 1929, the defendant's brother-in-law requested the pilot to fly the plane on a pleasure trip, and the pilot did so. Upon returning to the airport the plane collided with another plane and the pilot was killed. His widow sued the defendant for Compensation under the Compensation Act. *Held,* on appeal, that the claimant's husband was an employee of the defendant within the terms of the act and the widow is entitled to compensa-

tion. Judgment reversed. *Meyer* v. *Industrial Commission,* 347 Ill. 173, 179 N. E. 456 (1931).

Although there are several points involved in the instant case they may all be resolved into the single question: Was this pilot an "employee" of the defendant within the terms of the Workmen's Compensation Act?

By Section 1 of the Compensation Act it is provided that any employer in this state, not already under the act by reason of his business being extra-hazardous, may elect to come under the Act by filing a certificate of election with the Industrial Commission, or by taking out Workmen's Compensation insurance. Also, it is provided that in the event an employer does elect to come under the act his employees are deemed to have accepted its terms too, unless they renounce within a limited period: Cahill's Ill. Rev. Stat. (1931) Ch. 48, Sec. 201. This provision of the Statute was the same in 1929 when the accident occurred. Section 5 of the Act in 1929 provided: "The term 'employee', as used in this Act shall be construed to mean: * * * Second: Every person in the service of another under any contract of hire, express or implied, oral or written,—but not including any totally blind person or any person who is not engaged in the usual course of the trade, business, profession, or occupation of his employer; * * *": Cahill's Ill. Rev. Stat. (1929) Ch. 48, sec. 205.

The instant case is one of first impression in some respects and is an important precedent. Analagous cases of private chauffeurs for automobiles have not been found. The principal question is, as indicated, as to the status of this pilot.

Under the law in force in 1929 when the death occurred the term "employee" included then only those persons "under a contract of hire to another", and who were engaged in "the usual course of the trade, business, profession, or occupation of the employer". That this statutory definition of employee means just what it says has been previously decided. It has been held that unless these two primary requisites are present, namely: (1) a contract of hire; and (2) an engagement in the usual course of the employer's trade or occupation, the party claiming compensation is not an employee and does not come within the Act: *Johnson Co.* v. *Industrial Commission,* 306 Ill. 197, 137 N. E. 789 (1922); *Uphoff* v. *Industrial Board,* 271 Ill. 312, 111 N. E. 128 (1916); *H. Roy Berry Co.* v. *Industrial Commission,* 318 Ill. 312, 149 N. E. 278 (1925); *Kelly* v. *Industrial Commission,* 326 Ill. 320, 157 N. E. 209 (1927); *Angerstein,* The Employer and the Workmen's Compensation Act of Illinois (1923) p. 182.

That much being settled, the principal question in the instant case, leaving aside for the moment the matter whether this pilot was or was not an independent contractor, should have been: Was this pilot in the service of the defendant under a contract of hire, and engaged in the usual course of the trade, business, profession, or occupation of the defendant? On the first point, the opinion does not consider apparently to any great extent the matter of whether or not there was any contract of hire between the defendant and the pilot, although one looks in vain for any obligation incurred by the pilot in the arrangement. But aside from this possible objection to recovery, an even greater one can be suggested on the second point—as to whether or not the pilot was engaged in the usual course of the trade, business, profession, or occupation of the defendant.

As to this the reasoning of the court is rather unsatisfactory. After reviewing the definition of "employee", as given above, and the provisions of the act permitting the employer to insure his liability, the opinion states: "It is evident that by filing the above mentioned certificate and taking out compensation insurance, Louer (the employer) elected to put himself under the act and fully complied with all the requirements of the Act to that end. * * * Thus Meyer (the pilot), by Louer's election and his failure to renounce under the Act, became an employee and subject to the terms of the Act unless he was, as counsel contend, an independent contractor:" p. 458, 179 N. E. Nothing at all is said as to the very crux of the case, in answer to the argument that a private pilot flying a plane for its owner, who is engaged in the merchandise business, partly for business, but largely for pleasure trips, is not engaged in the usual course of his employer's business, and hence not within the Compensation Act, and more emphatically is this true when at the time the accident occurred the pilot was flying the plane not for the owner but for the owner's brother-in-law on what was admitted to have been a pleasure trip.

Although it is true, as the Court says, that the employer by electing to come under the Act and by taking out insurance, thus became bound by the Act, he did not, as the Court would seem to indicate, become bound to any and all persons who might work for him. He became bound to pay compensation only to such persons as came within the definition of "employee" as defined by the Act and not to such persons as were not under a contract of hire, or were not engaged in the usual course of his trade, business, profession, or occupation: *Johnson Co.* v. *Industrial Commission,* supra; *Uphoff* v. *Industrial Board,* supra; *H. Roy Berry Co.* v. *Industrial Commission,* supra; *Kelly* v. *Industrial Commission,* supra. The plain words of the Statute admit of no other interpretation. As to the further statement in the opinion, that, by the employer's election to be bound by the Act and the pilot's failure to renounce the Act, thus automatically the pilot became an employee, regardless of whether engaged in the usual course of the defendant's business or not, it need only be said that such view would seem to be clearly contrary to the expressed intention of the Legislature and if followed to its logical conclusion amounts to judicial nullification of Section 5, subsection 2 of the Compensation Act.

Section 1 of the Act, providing for election by an employer, and Section 5, defining what an employee is, should be read together. The Compensation Act was enacted as a whole and it was never meant that one section should be taken as totally disassociated from the other sections: *Uphaff* v. *Industrial Board,* supra. Does the instant opinion mean that these two sections are separable? Does it mean that, by the mere election of an employer to come under the Act and the mere failure of his workman to renounce, such workman automatically becomes an employee, irrespective of whether the workman is engaged in the employer's regular business? Does the Court mean to separate Section 1 and Section 5? If so, the interpretation is strained and erroneous and the case was wrongly decided for that reason. If not, if these two sections are still to be read together as they should be, then the case was still wrongly decided because it cannot be fairly said that this pilot, in this particular situation was engaged in the usual course of the defendant's business as Manager for Mandel Brothers.

But there is another possible explanation of the principal case. At the last regular session of the Legislature (1931), Section 5, Subsection 2, of the Workmen's Compensation Act was amended in a most material aspect. After the definition of "employee" as given above, stating that the word does not include persons not engaged in the usual course of the employer's trade, business, profession, or occupation, the 1931 Amendment is as follows: "Provided, however, that any employer may elect to provide and pay compensation to any employee other than those engaged in the usual course of the trade, business, profession, or occupation of the said employer by complying with Section 1 of this Act:" Cahill's Ill. Rev. Stat. (1931), Chap. 48, Sec. 205. The mere fact that the Legislature saw fit to enact this amendment indicates rather clearly the Legislative intention and construction of the law prior to this time, namely, that the Compensation Act did not include persons who were not engaged in the usual course of their employer's business.

The Supreme Court has not yet interpreted this Amendment. As outlined above, according to the law presumably in force in 1929, the time of the accident in the instant case, it is at least questionable whether the case was rightly decided, because of the fact that a strong argument could be made that this pilot was not engaged in the usual course of the defendant's business and was not therefore an employee under the Act. But, according to the 1931 Amendment, the employer may, if he chooses, provide compensation for workmen even though not engaged in the usual course of his business. Although the position of the Court is somewhat ambiguous, it is possible that it may have been considered that this Amendment had retroactive effect, and thus controlled a situation occurring more than two years before the Amendment went into effect. If such is the position taken, a very serious question might arise as to whether this was not a violation of due process: *Rankel* v. *Industrial Commission of Ohio*, 109 Ch. St. 152, 141 N. E. 835 (1923). If, on the other hand, the Court did not mean to take this extereme position, then the law should apply as it was in 1929, and under that view the position of the Court is unsound for the reasons above given.

Although this was the principal point in the instant case there is another matter that should be noticed. The question was raised as to whether or not the pilot in this case was at the time of the accident a special employee of the defendant's brother-in-law. In deciding that the pilot was not such an employee, the Court disposes of the matter in these words: "As we have seen, Bird (the brother-in-law) had no authority to discharge Meyer (the pilot). * * * This court has held that an unfailing test in determining the relation of master and servant is whether the control of the servant includes the power to discharge him, and unless that power exists the relation of master and servant does not exist:" P. 458, 179 N. E.

At common law, prior to the enactment of the Workmen's Compensation legislation, it is true that a general employer might for temporary purposes loan his employee to another party and the employee would, during the existence of such relation, be regarded as the employee not of the general employer but of the special employer to whom he had been lent: *Grace and Hyde Co.* v. *Probst*, 208 Ill. 147, 70 N. E. 12 (1904); *Consolidated Fireworks Co.* v. *Koehl*, 190 Ill. 145, 60 N. E. 87 (1901); *Scribner's* case, 231 Mass. 132, 120 N. E. 350 (1918); *Cayll* v. *Industrial Commission*, 172

Wis. 554, 179 N. W. 771 (1920). See also, for the English change in this Matter: Stat. 6, Edw. VII, Ch. 58, Sec. 13.

The question now is whether this distinction between general employers and special employers is any longer valid under the Workmen's Compensation Legislation. The authorities it must be admitted are in conflict. The difficulty is that, at least in Acts similar to the Illinois Act, the term "employee" has been defined as "anyone under any contract of hire, express or implied with another:" Cahill's Ill. Rev. Stat., supra. Authorities taking the view that the common law has been changed say that under the clear words of the Compensation Acts if there is a contract between a so-called employee and his employer it is immaterial that there may also have been a second special employer. The general employer is in any event liable for compensation because of his contract. The contract is the thing to be looked to now. It is not the province of the court to engraft common law distinctions upon a word which has been defined once and for all by the Legislature. Other authorities have adopted the view that despite what the Legislature may have said about an employee, the common law rules are still applicable and the general employer is not liable for compensation in such cases: *Scribner* case, supra: *Cayll* v. *Industrial Commission,* supra; *Puhlman* v. *Excelsior Express and Standard Cab Co.,* 259 Penn. 393, 103 Atl. 218 (1918); *Knudson* v. *Jackson,* 191 Ia. 947, 183 N. W. 391 (1921); *Pace* v. *Appanoose County,* 184 Ia. 498, 168 N. W. 916 (1918); *Rongo* v. *Waddington and Sons,* 87 N. J. L. 395, 94 Atl. 408 (1915); *Harper,* Workmen's Compensation, p. 209; *Angerstein,* The Employer and the Workmen's Compensation Act of Illinois p. 168-195.

The view that the common law distinction has been abolished, and that the primary consideration on this question should now be whether there is a contract of hire or not would seem to be more acceptable, in view of the fact that the Compensation Act has changed the common law in so many respects, and in view of the fact that the Act does specifically define an employee as one under a "contract of hire." Had this view been taken in the instant case the whole question of whether or not the pilot was a special employee of the owner's brother-in-law could very easily have been dismissed by merely saying one of two things: (1) that there was no evidence of any contract between the brother-in-law and the pilot; or (2) that it is immaterial whether there was or was not a contract of that character, because, in any event, if there was a contract between the pilot and the defendant in this case and if the pilot had been engaged in the usual course of the defendant's business, the defendant would have been liable under the Act.

CHAS. G. BRIGGLE, JR.

DIGESTS

CRIMINAL LAW—CONSPIRACY TO VIOLATE AIR TRAFFIC RULES.—[Federal] The defendants were indicted for conspiracy to do an act in violation of "the Air Traffic Law and Rules of the United States," to-wit, the Air Commerce Act—authorizing the Secretary of Commerce to establish air traffic rules and making unlawful the violation of such rules—and the rules and regulations established in conformity thereto. The rules that the defendants were charged with conspiracy to violate were Sec. 1, Sub-Sec. F, providing, "When an aircraft is in flight the pilot shall not drop or release * * * any object or thing which may endanger life or injure property,

except when necessary to the personal safety of the pilot, passengers, or crew * * *," and Sub-Sec. K, prohibiting the transportation of explosives. The indictment charged the defendants with transporting by airplane bombs and explosives from Illinois to Kentucky, and with dropping them "in Webster County, Kentucky, to the great danger of life and injury of property." Five of the defendants pleaded guilty and were sentenced to imprisonment in the Atlanta penitentiary, two for a year and a day, and three for eighteen months. *United States* v. *Montgomery, et al.*, 1931 U. S. Av. R. 29 (D. C., W. D. Ky., 1930).

This seems to be the first reported prosecution for violation of the federal air traffic rules.

ABRAHAM FISHMAN

INSURANCE—ACCIDENT WHILE ALIGHTING FROM AN AIRPLANE AS WITHIN EXCEPTION FOR ACCIDENTS "WHILE IN OR ON AN AIRPLANE".—[Louisiana] The plaintiff's husband held an accident policy in the defendant company for the benefit of the plaintiff. A clause in the policy provided that the insurance did not cover injuries to the insured sustained "while in or on any vehicle or mechanical device for aerial navigation, or in falling therefrom or therewith." The insured and some friends chartered a sea-plane for a pleasure flight across Lake Pontchartrain. In getting aboard the plane for the return trip the insured stepped upon the wing, was struck by the propellor and killed. The lower court sustained an "exception of no cause of action" to the plaintiff's petition, and the plaintiff appealed. *Held,* the insured did meet his death "while in or on" a "vehicle or mechanical device for aerial navigation." Judgment affirmed. *Murphy* v. *Union Indemnity Co.* 172 La. 383, 134 So. 256 (1931).

Apparently only two other courts have considered questions arising from fact situations similar to this. In the case of *Pittman* v. *Lamar Life Insurance Co.*, 17 F. (2d) 370 (C. C. A., 5th, 1927) the significant language of the exclusion clause was "while participating or as a result of participation in any submarine or aeronautic expedition or activity, either as passenger or otherwise." In that case the insured had disembarked and walked to the front of the plane when he stepped too close to the propeller. It was decided that the term "aeronautic activity" was broad enough to cover getting out of an airplane. A year later the phrase for the interpretation of a California court was "while participating or in consequence of having participated in aeronautics". In this case the insured was killed by the propellor of a plane in which he had just been riding. The court, failing to find a causal relation between the airplane rule and the accident to the deceased, held against the insurance company: *Tierney* v. *Occidental Life Ins. Co.* 89 Cal. App. 779, 265 Pac. 400 (1928).

It is not possible to draw a valid generalization from these cases since the language of the policies in question differs in each case.

GEORGE BALL

INSURANCE—INCONTESTABLE CLAUSE—DEATH WHILE ENGAGED IN AERIAL NAVIGATION.—[Louisiana] This was an action on an insurance policy which contained a provision that in case of the death of the insured from engaging in aerial navigation, "except while riding as a fare-paying passenger in a licensed commercial air craft provided by an incorporated common carrier for passenger service and while such air craft is operated by a licensed transport pilot and is flying in a regular civil airway between definitely established airports, the only liability under this policy shall be for a sum equal to the premiums paid thereon, and the policy shall thereupon be terminated." The insured was killed while a passenger in an airplane which met none of these requirements. However, the beneficiary sued for the full face value of the policy contending that a clause which stipulated that the policy should "be incontestable after it shall have been in force, during the lifetime of the insured, for one year from the date of the Policy, except for non-payment of premium or for violation of the conditions of the Policy relating to military or naval service in time of war," was

determinative of this case. The Court of Appeals decided this action for the plaintiff beneficiary. *Held,* on appeal, that the incontestable clause negatived the effect of the exception for airplane travel. Judgment affirmed. *Bernier* v. *Pacific Mutual Life Ins. Co. of Cal.,* 232 C. C. H. 2015 (Louisiana Sup. Ct. Decided January 4, 1932).

The decision of this case by the Court of Appeals is reported under the title of *Leidenger* v. *Pacific Mutual Life Ins. Co. of Cal.,* 135 So. 85 (1931). Essentially the same questions were raised by the arguments before the Court of Appeals and the Supreme Court and they are adequately discussed in a comment on *Leidenger* v. *Pacific Mutual Life Ins. Co. in* 2 JOURNAL OF AIR LAW 602 (1931).

GEORGE BALL

NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — QUALIFICATIONS OF PILOT. — [California] Plaintiff was receiving instruction in flying under a contract with defendant company by which the company agreed, for a consideration (the amount being dependent on whether the plaintiff's or defendant's plane was used) to provide a "competent instructor" in "practical flying at the port or flying field of the company." On the day of the accident, plaintiff's own craft, which was unlicensed although it had been assigned an identification number, was being used, and the defendant had furnished as an instructor a pilot who held only a limited commercial license (permitting flight only within ten miles of the base port). At plaintiff's request, he and the instructor flew to Ponomo, California, over ten miles from defendant's base port, plaintiff operating the plane during the greater part of the journey, but the instructor operating it at the time of the accident. While flying at an altitude of about 300 feet, the plane crashed and plaintiff and his plane were injured. There was conflicting evidence as to whether the instructor's operation (apart from low altitude) was negligent. The trial court found (in addition to findings not complained of): (1) "That it is untrue that . . . defendants appointed . . . an unlicensed pilot as defendant's servant and employee to act as instructor to said plaintiff . . ."; (2) That the instructor was not negligent; and (3) That the plaintiff was contributorily negligent, in that, being unlicensed, he had flown the plane to Ponoma. *Held,* on appeal, that the judgment should be affirmed since: (1) there was some evidence to support each finding (and in particular to support the finding that the instructor was not negligent); and (2) plaintiff could not complain of the use of his own unlicensed craft nor of the violation of the instructor's license limitations, since both were at his express request. *Pickering* v. *California Airways,* 67 Cal. App. Dec. 442, 4 P. (2d) 271 (1931).

The decision herein can not be questioned, since it is well settled that a finding of fact by a trial court, based on conflicting testimony will not be disturbed on appeal. The only finding which could have been questioned under this doctrine was that relating to the pilot's license. In making such a finding the trial court undoubtedly fell into error, as the question was not whether the pilot held *some* license, but whether he held a license covering the flying operation in which he was engaged. It is submitted that, *as to this flight,* the pilot was "unlicensed." However, this finding is not necessary to the judgment, both because of the finding of lack of negligence and because the lack of license was waived by plaintiff in proposing the flight with knowledge of the pilot's actual license.

ROBERT KINGSLEY.

WORKMEN'S COMPENSATION—SCOPE OF EMPLOYMENT—INJURY RESULTING FROM PROHIBITED ACROBATIC FLYING.—[Wisconsin] The deceased was employed by the plaintiff air transport company as a pilot and general manager of its flying field. One of his duties was to take passengers for rides. In the course of such a flight he made a sharp power dive and was killed. On an appeal from an award the plaintiff contended that the death did not occur in the course of the employment for three reasons: (1) That no tickets were sold or money paid for the ride; (2) That the deceased

had been drinking intoxicating liquor just prior to the flight; and (3) That by taking the power dive he stepped out of the course of his employment. The Wisconsin statute required that aircraft operations comply with the federal air traffic rules, one of which prohibited pilots carrying passengers for hire from engaging in acrobatic flying, defined to mean "intentional maneuvers not necessary to air traffic." *Held,* (1) The failure to require tickets was only a minor infraction of the prescribed routine, which, in the case of a general manager, necessarily empowered with a wide discretion, could not have the effect of taking him out of the course of employment; (2) Nor was the drinking of the intoxicating liquor sufficient to remove the deceased from the course of his employment, there being no evidence as to how much he drank nor that he was intoxicated or affected by it; (3) But by taking the dive, which may reasonably be assumed to be in violation of his orders, the deceased left the course of his employment, for, in the first place, the act, besides being unlawful, was an act "unnecessary in the performance of his duty" and was one which in no "manner did or could possibly have furthered the interests of his employer," and secondly, the act was done deliberately "for the sole and only purpose of gratifying his own pleasure of having a thrill." Award set aside. *Sheboygan Airways, Inc., et al. v. Field & ano.,* 232 C. C. H. 2027, March 3, 1932 (Circ. Ct., Dane County, Wisc., Feb. 15, 1932).

The air traffic rule referred to applies only to carriage for hire. The plaintiff apparently contended that this was not a flight for hire, but the opinion does not consider whether this was such a flight so as to be within the regulation. For analagous cases see *Datin* v. *Vale,* 1931 U. S. Av. R. 175 (Pa. Dept. of Labor and Industry, Jan. 19, 1931), 3 JOURNAL OF AIR LAW 143, and *Constitution Indemnity Co.* v. *Shytles et al.,* 47 F. (2d) 441 (C. C. A., 5th, 1931), 3 JOURNAL OF AIR LAW 137.

ABRAHAM FISHMAN